



Comptroller General
of the United States

Washington, D.C. 20548

Gilhooley

Decision

Matter of: Power Ten, Inc.
File: B-236725
Date: December 18, 1989

DIGEST

Bid was properly rejected as nonresponsive where the bid contained a provision requiring the government to order a minimum option quantity, if it ordered any quantity under an option clause which gave the government the unilateral right to increase the quantity up to 300 percent of the basic contract quantity.

DECISION

Power Ten, Inc., protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DAAB07-89-B-N002, issued by the U.S. Army Communications-Electronics Command (CECOM), Fort Monmouth, New Jersey, for power supplies. We deny the protest.

The IFB solicited prices for a basic quantity of 61 power supplies and option unit prices for quantities "up to but not exceeding 300 percent" of that basic quantity. Bidders were advised that the government would evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement, but that evaluation of options would not obligate the government to exercise the option(s).

Power Ten submitted a bid which included the note "100 percent min." next to its option price. CECOM subsequently rejected Power Ten's bid on the ground that the note limited the rights of the government by qualifying the minimum option quantity the government could order.

According to Power Ten, the purpose of adding "100 percent min." was to place a minimum requirement upon the quantity of supplies that the government could order under the option. Power Ten states that its objective was to structure the option amount into quantities that would be economical and practical for it to produce. Power Ten

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contends that its bid was responsive because the IFB did not prohibit bidders from specifying a minimum option quantity.

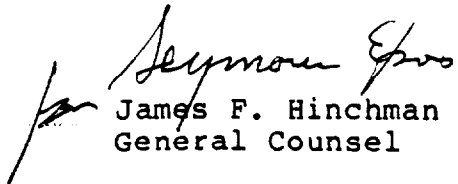
A bid is responsive only if the bidder has unequivocally offered to provide the requested items or services in total conformance with the requirements specified in the IFB. Inscom Electronics Corp., B-225858, Feb. 10, 1987, 87-1 CPD ¶ 147. Where a bidder qualifies its bid to protect itself or reserves rights which are inconsistent with a material provision of the IFB, the bid must be rejected as nonresponsive. F.J. Dahill Co., Inc., B-235272, Aug. 3, 1989, 89-2 CPD ¶ 103. A qualification in a bid is material if it affects price, quality, quantity or delivery or the legal rights of the government. Galaxy Custodial Servs., et al., 64 Comp. Gen. 593 (1985), 85-1 CPD ¶ 658; Inscom Electronics Corp., B-225858, supra.

In our view, CECOM correctly rejected Power-Ten's bid as nonresponsive because the language inserted in its bid conflicted with IFB clause H-4, "Option Requirement-Supplies." Paragraph H-4(a) states that ". . . the government may increase the quantity of supplies called for in Section B by up to but not exceeding 300 percent of CLIN 001. . . . The contracting officer may exercise this option at any time and from time to time, from date of award until 30 DAYS AFTER DELIVERY OF FIRST 20 UNITS, by giving written notice to the contractor." Power Ten's restriction of the minimum quantity of supplies that the government could order under the option is inconsistent with the quoted paragraph, which vests the contracting officer, not the contractor, with the unilateral legal right to make the determination regarding the quantity of additional supplies to be ordered under the option. See Federal Acquisition Regulation (FAR) § 17.201 (FAC 84-37). Since Power Ten's bid significantly affected the legal rights of the government and the obligations of the contractor to order and accept option quantities, its bid was properly rejected as nonresponsive. Galaxy Custodial Servs., et al., 64 Comp. Gen., supra; Hewlett-Packard Co., B-216530, Feb. 13, 1985, 85-1 CPD ¶ 193.

In its comments on the agency report, Power Ten argues that its limitation on the quantity of supplies the government could order under the option was reasonable in light of the advice given in a private procurement publication to ". . . be very careful before accepting an Option clause that contains an open option quantity limited only by a maximum. Instead, you should attempt to negotiate at least a minimum quantity that the buyer can order." The procurement here,

however, was not negotiated, but instead was based on sealed bid procedures. Consequently, Power Ten could not take exception to an IFB requirement under the guise of "negotiation." Rather, any objections Power Ten had regarding the option clause should have been raised before bid opening. See 4 C.F.R. § 21.2(a)(1) (1989).

The protest is denied.


James F. Hinchman
General Counsel